

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable Beth Labson Freeman, Judge
4

5 CISCO SYSTEMS, INC.,)
6 Plaintiff,)
7 vs.) No. C 14-05344-BLF
8 ARISTA NETWORKS, INC.,)
9 Defendant.)
10 _____)

11 San Jose, California
12 Thursday, June 16, 2016

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
14 RECORDING 11:25 - 12:15 = 50 MINUTES

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1 Thursday, June 16, 2016

11:25 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling case 14-05344, Cisco Systems
5 versus Arista Networks.

6 Counsel, please come forward and state your appearance.

7 MS. SULLIVAN: Good morning, your Honor. Kathleen
8 Sullivan for plaintiff Cisco.

9 THE COURT: Good morning.

10 MR. VAN NEST: Good morning, your Honor. Bob Van
11 Nest for defendant Arista. And I'm here with Brian Ferrall
12 and Jason Silver.

13 THE COURT: Good morning.

14 MS. SULLIVAN: And, your Honor, I'm here with Amy
15 Candido.

16 THE COURT: Good morning.

17 Well, this is one of those cases that ages the whole
18 group of us, right, Mr. Van Nest?

19 MR. VAN NEST: Yes, it does. Yes, it does.

20 THE COURT: Okay. Well, there are a lot of issues
21 that are pending today. I think I want to start off by
22 saying that the trial date is firm, and so that may clarify
23 some of the issues that are pending.

24 Ms. Sullivan, I know that's of great concern to your
25 client.

1 MS. SULLIVAN: Yes, it is, your Honor.

2 THE COURT: And way back when this case started, I
3 did somersaults to provide what is on my calendar an
4 expedited hearing -- trial date, and I have cleared out
5 everything else so you're not waiting in line on that trial
6 date.

7 And you don't have an 84-year-old defendant that's
8 going to bump you out of your trial. And those dates are
9 hard to come by. This case would have to be postponed until
10 early 2019. And I know all the arguments on the reasons
11 this case needs to go forward, because we've been through
12 them before.

13 And so with that comment, Mr. Van Nest, perhaps some of
14 these issues we can deal with in a more expedited way.

15 I know you'll be filing summary judgment motions in the
16 next couple of weeks; is that right?

17 MR. VAN NEST: That's right.

18 THE COURT: All right. And that's of course an
19 important juncture in this case, and that will be important.

20 You're asking -- there are a few things that you're
21 asking for, making some minor modifications to the pretrial
22 submission dates.

23 MR. VAN NEST: I think we expect to have an
24 agreement on that, your Honor. I think the worst it will be
25 is the dates in your standing order. There won't be any

1 worse than that. But the parties are discussing those
2 pretrial filing dates, and I expect to come to an agreement
3 and we'll submit a stipulation on that. And we'll make sure
4 that you get the time that you --

5 THE COURT: I'm not approving one that doesn't
6 give me the time I ordinarily get.

7 MS. SULLIVAN: That's correct.

8 MR. VAN NEST: Hopefully it will be better than
9 that.

10 THE COURT: And that's fine, and I do appreciate
11 that.

12 MS. SULLIVAN: That's correct, your Honor. We are
13 happy to come to an agreement and submit a revised schedule
14 to your Honor.

15 THE COURT: I appreciate that.

16 MS. SULLIVAN: The dates that we are discussing
17 would be October 12th and October 19th. October 12th is the
18 last day to meet and confer and October 19th for the
19 submission of the joint pretrial statement and order to you.
20 That would come in one day better than you're standing order
21 in both cases.

22 THE COURT: Okay. Sure. That's great.

23 Okay. So now we've kind of cleared away the easy
24 stuff. There is a motion to strike late contentions or to
25 reopen discovery. That -- I'm saving the best for last of

1 course here.

2 But with the trial date being firm, that motion is now
3 pending I suppose before me, and I'm wondering if it
4 shouldn't actually go to Judge Cousins.

5 MR. VAN NEST: It could, your Honor. That would
6 be fine with us. It was filed here because -- not that
7 we're asking for additional time. We're really asking to
8 have these late-filed contentions stricken, and so I think
9 Judge Cousins would be a perfect place for that, in light of
10 your Honor's comments on the trial date.

11 THE COURT: Okay. Any objection to that?

12 MS. SULLIVAN: May I confer, your Honor?

13 THE COURT: Yes, please.

14 (Pause.)

15 MS. SULLIVAN: Your Honor, Cisco is amenable to
16 that. As you pointed out, Cisco's goal is to keep the trial
17 date.

18 THE COURT: Yes.

19 MS. SULLIVAN: I would just like to also say that
20 Cisco would be amenable to an earlier hearing date if the
21 Court wanted to keep the motion in front of the Court.

22 THE COURT: I'm hopefully actually Judge Cousins
23 can get to it. I believe you have some matters pending
24 before him right now.

25 MR. VAN NEST: We do, your Honor. He's been very

1 prompt.

2 THE COURT: And so I think that's going to be a
3 quicker resolution, and I will talk to him about that.

4 It's my understanding that the patent local rules on
5 disclosure of contentions do not apply in copyright cases.
6 Is that an issue -- I didn't read the papers on this, but is
7 that an issue in dispute here?

8 MR. VAN NEST: Not really, your Honor.

9 THE COURT: Okay.

10 MR. VAN NEST: This is not a patent disclosure
11 issue.

12 THE COURT: No, it's not. It's about the
13 copyright side of the case.

14 MR. VAN NEST: That's right.

15 THE COURT: Okay.

16 MR. VAN NEST: I think Judge Cousins is going to
17 resolve it. And I think you're right, he'll resolve it
18 perhaps more quickly than your Honor's schedule will allow.

19 THE COURT: All right. So I will make that
20 referral.

21 MR. VAN NEST: And we'll re-file there as well.

22 THE COURT: I don't know that he allows the full
23 briefing that you might have presented to me. I don't know.

24 MR. VAN NEST: He typically doesn't but we'll see
25 what he'd like.

1 THE COURT: So I don't need to refer it to him; it
2 will be re-filed?

3 MR. VAN NEST: Either way, your Honor. I think it
4 would be good for your Honor to let him know --

5 THE COURT: I most definitely will.

6 MR. VAN NEST: -- that it was filed here and that
7 we'll be in touch.

8 THE COURT: That's great. Okay.

9 MR. VAN NEST: That would be good. That would be
10 helpful.

11 THE COURT: That makes sense. All right.

12 Now, then we have the issue that actually was new to
13 me, whether we're going to engage in an exercise of, I guess
14 we'll call it the filtering process.

15 MR. VAN NEST: That's right, your Honor.

16 THE COURT: So let me hear from you, Mr. Van Nest.

17 MR. VAN NEST: Yeah, what we're -- you're quite
18 right that we're filing our summary judgment motions in a
19 couple weeks and we're hopeful that those will narrow the
20 case, and we think they will. Those will address some
21 copyright issues and some patent issues --

22 THE COURT: Okay.

23 MR. VAN NEST: -- on whatever remaining patent
24 that we have in the case.

25 But the Ninth Circuit also requires that even where

1 some item is copyrightable, there be a pretrial
2 determination of whether or not there are aspects that
3 should be filtered out as unprotectable.

4 And what the Ninth Circuit has said is that the judge
5 needs to decide ahead of time really two things. First, the
6 plaintiff will presumably be telling us what are the items
7 of similarity that the jury is to compare.

8 THE COURT: Yes.

9 MR. VAN NEST: Then secondly the Court looks at
10 those similarities and determines whether some of them are
11 simply unprotectable. And in the Apple case Judge Walker
12 determined a number of the elements weren't protectable, and
13 the Harper House case the same thing wasn't done and the
14 Ninth Circuit reversed it. And the reason for that is to
15 make sure that the jury is actually making an infringement
16 determination based on copyrighted materials that are
17 protectable.

18 And the third thing -- or the second the Court needs to
19 decide is if there are protectable elements left after the
20 filtering process, what level of protection do they deserve.
21 If the protection is broad, then the standard is a little
22 bit more relaxed, right? Substantially similar.

23 If the protection is thin -- and we think that will be
24 the case here -- then the standard is higher. And the
25 reason that -- trials go a lot better when the jurors

1 understand from the beginning what it is they're expected to
2 do. And, as you know in our district, we spend a lot of
3 time on jury instructions ahead of time and what the jury is
4 going to be told from the get-go about what they're to do.

5 And so in this instance, all we're really asking for is
6 a short additional brief of 10 to 15 pages -- and we've
7 proposed a briefing schedule that's in parallel with summary
8 judgment -- and a hearing following that briefing, which
9 could also occur in conjunction with summary judgment where
10 this filtration process occurs.

11 THE COURT: So let me just ask you about it.
12 Putting aside whether you're entitled to that and whether it
13 makes sense in terms of trial management. It's very
14 enticing that you're offering to submit a very concise brief
15 of 10 to 15 pages, but does this come along with 6,000 pages
16 of exhibits?

17 MR. VAN NEST: No. No, what it would come along
18 with is a short declaration from our expert. He's prepared
19 a short appendix that kind of lays out the source of these
20 so-called protectable elements in the CLI. And it's -- we
21 have -- we can't avoid the fact that they're still pressing
22 forward on 500 individual commands.

23 THE COURT: I understand that.

24 MR. VAN NEST: And I've been saying from day one,
25 there's got to be a way to manage this. It's currently not

1 manageable already for a trial of two to three weeks'
2 duration, which is what we have.

3 But what our expert would be addressing is a number of
4 the elements. And a lot of them overlap because the same
5 terms are used over and over and you see a lot. So it's not
6 as though there's 500 individual decisions to make. That's
7 not the case.

8 But it will be a short declaration and a submission
9 probably of one of the appendixes of his report. And then
10 there would be a response, I'm sure, from Cisco.

11 And if your Honor felt as though hearing from the
12 experts was important or necessary, you could either do that
13 or refer that to Judge Cousins, I suppose, or simply hear it
14 at oral argument either on the date of our summary judgment
15 or some other date convenient to the Court.

16 We have an August 4 date, I believe, for summary
17 judgment.

18 THE COURT: Yes.

19 MR. VAN NEST: The idea is, we believe even if --
20 even if the CLI are copyrightable -- which of course we
21 don't believe they are. But even if they are, there are
22 many elements in them that were either taken from industry
23 standards or copied from prior sources or are in common use
24 in the industry not only by Cisco and Arista but by
25 everybody else. And that's what our expert has analyzed and

1 has presented.

2 And I think, if we're right, even if your Honor were to
3 find that the CLI overall are copyrightable, this would
4 dramatically reduce what the jury would need to decide.
5 They would be told: Hey, here are the elements that are
6 actually protectable and in suit, and the standard you're to
7 apply in comparing them to Arista's accused work is
8 virtually identical, or substantially similar, depending on
9 what your Honor were to determine.

10 So it seems to us that there's really -- the suggestion
11 Cisco makes that we sort of roll into the trial and do this
12 later makes no sense.

13 THE COURT: Well, so you are our expert on this in
14 the Oracle/Google case. That's exactly what Judge Alsup
15 seemed to have done. At least I was referred to an order
16 from the first trial.

17 MR. VAN NEST: Right.

18 THE COURT: I don't actually know what you've just
19 done, but I would say he kind of gave you the bum's rush on
20 this request during the first trial with a two-sentence
21 order. So it left me wondering, how did that actually work
22 out.

23 MR. VAN NEST: Very poorly. The case was reversed
24 and we tried it twice. I mean the whole point --

25 THE COURT: But what happened the second time?

1 MR. VAN NEST: The --

2 THE COURT: Did the federal circuit's opinion take
3 care of this issue?

4 MR. VAN NEST: The federal circuit's opinion took
5 care of this issue.

6 THE COURT: Okay.

7 MR. VAN NEST: And all we tried the second time
8 was fair use.

9 THE COURT: Okay.

10 MR. VAN NEST: So there wasn't -- in other words,
11 the second time, the trial we just completed. The only
12 issue was fair use --

13 THE COURT: Yes.

14 MR. VAN NEST: -- and damages for phase two,
15 but -- because the federal circuit was all the other issues.

16 THE COURT: I see.

17 MR. VAN NEST: Now, had -- I hate to say it, but
18 it's certainly true that had Judge Alsup reached his
19 decision as we're asking your Honor to do ahead of time,
20 then we wouldn't have had a first trial. We would have just
21 had the second trial on fair use.

22 He decided they weren't copyrightable, right? So
23 there's no reason to have a trial if that's the situation.
24 But yet we had a first trial, and then that went up and that
25 was reversed.

1 So I'd say also there's a big difference between the
2 APIs that were at issue in the Oracle/Google case and the
3 CLI that are --

4 THE COURT: That I can't judge, sure. Okay.

5 MR. VAN NEST: -- human commands here.

6 You'll get into that when we file our motions and
7 stuff. There are significant differences. But the order
8 they cite was later reversed, which meant that we spent all
9 that time in the first trial to no avail, and the second
10 trial which we just completed was the one that resolved the
11 issue for the parties.

12 So what we're saying is: Here, it's more complicated.
13 They have 500 individual commands. They're pressing
14 forward, as far as know, on all 500. We don't think any of
15 them are copyrightable. But even if they are, it's going to
16 be important to get this case focused on what the jury
17 should actually be deciding. Are there protectable elements
18 and have they been infringed by Arista in its product.

19 THE COURT: All right. So there are -- I mean
20 there's the threshold issue of whether you're even entitled
21 to that early determination and that filtering.

22 And then there's the second question which is how do I
23 actually do that, because if you only submit to me a
24 declaration of an expert that makes it clear that I will
25 have an opposite opinion of an expert on the other side and

1 then I would be determining -- then do I need an actual
2 hearing so I can judge credibility of the experts in order
3 to make this determination?

4 So then it raises the question of what factual issues
5 are there in developing this. I mean you talk about whether
6 something was copied from somewhere else. So that's a
7 factual determination.

8 If it's an industry standard, it might not be factual.
9 I'm not sure because I don't know what kind of evidence
10 there would be.

11 And it appears from the cases that I've read -- and I
12 want to hear from Ms. Sullivan on this -- that it is a
13 judicial function and not a jury function to make this
14 decision. But I'm not positive of that because whenever
15 there are factual issues to determine, I become concerned
16 that -- I don't want to go into an area that's not mine
17 alone.

18 MR. VAN NEST: Well, I think two things are true,
19 your Honor. We contemplated filing and having an opposition
20 of course and a reply, and your Honor could decide I think
21 based on that whether you need a hearing or not or whether
22 you want to refer this to the magistrate.

23 THE COURT: Well, I wouldn't refer it. No, no.
24 Although I know I could. This is not the kind of thing I
25 would refer because anything that is actually at the trial,

1 I need it to be my own rulings.

2 MR. VAN NEST: Fair enough.

3 THE COURT: I'd like to be reversed myself and not
4 on somebody else.

5 MR. VAN NEST: Fair enough. Then I think your
6 Honor could make that determination. And I think that there
7 would be many areas where the parties will agree that
8 something is an industry standard or is taken from an
9 industry standard based on the depositions we've taken so
10 far.

11 THE COURT: Okay. I see.

12 MR. VAN NEST: There will be areas, I'm sure, of
13 disagreement, but that's why it's not summary judgment.
14 It's a judicial function that requires, in some cases,
15 resolution of disputed facts.

16 For example, a lot of words in the commands pre-existed
17 anything Cisco did, and the engineers at Cisco were aware of
18 them because of prior work in the industry. And there's no
19 dispute that those words or combinations of them appeared in
20 what I'll call prior art, but it's really pre-existing
21 materials. And so they're not truly original.

22 And what they're arguing is, well, the way we put it
23 together, and so on and so forth. And the other words we
24 added.

25 THE COURT: That would have support in the case

1 law, don't you think?

2 MR. VAN NEST: Well, I think they do with
3 respect -- there may be some multi-word commands that
4 survive the filtering process. I'm not conceding that, but
5 that's possible. But I am indicating that there are many,
6 many, many commands and words within the commands that will
7 not.

8 THE COURT: So you're suggesting that these 500
9 commands are a unit like the GUI was in the Apple case. But
10 it's so different because that was the artistic expression
11 of it.

12 Here, I've got 500 separate CLIs, don't I?

13 MR. VAN NEST: They are separate. Many of them
14 are very similar.

15 THE COURT: And so I -- I appreciate that. But
16 when you talk about the elements, you're suggesting -- and
17 if I have to do this, I'll do it -- that I'm going to look
18 at each one individually and make a determination on whether
19 it's copyrightable or not.

20 When you say the elements, I'm not going to say -- are
21 you suggesting that certain words might be eligible for
22 protection in one, I'll call it phrase? In one command?

23 MR. VAN NEST: It's kind of the flip side of that,
24 your Honor.

25 THE COURT: Okay.

1 MR. VAN NEST: I don't think you'd be looking at
2 500 separate commands --

3 THE COURT: Okay.

4 MR. VAN NEST: -- because of these are in groups.

5 THE COURT: Sure.

6 MR. VAN NEST: For example, the word "show"
7 appears over and over and over in many, many commands. And
8 that was out and being used and common long before anything
9 Cisco did.

10 THE COURT: Okay.

11 MR. VAN NEST: But I say the "flip side." I say
12 there are many words from industry standards or from
13 pre-existing systems that don't qualify for protection,
14 right?

15 THE COURT: Well, it's just an interesting thing
16 to pluck out a word and then you're really -- well, I don't
17 want to get into the merits of it, but I'm just trying to
18 understand what I'd be buying into if I agreed with you.

19 MR. VAN NEST: What you'll be buying into is
20 reviewing, as I said, a short brief and a declaration from
21 our expert and determining whether or not from that, and of
22 course the opposing materials -- determining which of the
23 words and which of the commands deserve protection and which
24 don't. Because if we don't do it ahead of time, as in the
25 Harbor House case, the court didn't do it and the case came

1 back because there, the Court of Appeal in the Ninth Circuit
2 said it's not clear what the jury was actually comparing.
3 And if they were basing their infringement finding on
4 unprotectable elements, that verdict can't stand. And it's
5 not clear because the trial judge didn't make clear what the
6 jury was to do and basically threw it all in the hopper and
7 let the jury decide it, when clearly in that case, there
8 were unprotectable elements mixed in with protectable
9 elements.

10 THE COURT: So then it raises the issue of whether
11 I shouldn't just hear this trial once, send the jury home,
12 make the determination in the final jury instructions.
13 Because what it appears to me is the jury is going to render
14 500 separate verdicts, potentially, on each of the commands
15 that are at issue. Yes, they may be grouped. I appreciate
16 that, and you may ultimately collapse it into certain
17 groupings that are going to be in or out that you agree to.

18 But is that the -- I mean I'm just concerned that it's
19 going to be two trials.

20 MR. VAN NEST: I don't think so. I think the
21 first hearing that we, you know, propose be done on a
22 parallel track, would give your Honor an opportunity to look
23 and see if there are some -- some of the words which I think
24 you will determine clearly can't be protected and give Cisco
25 some direction as to what they need to do.

1 In other words, they want to proceed on at least two
2 fronts. They want to talk about the overall structure of
3 the CLI, sort of a hierarchy and the modes and so on. And
4 they also want to press forward on 500 individual commands.

5 So if they're going to do the latter, we certainly have
6 the right to challenge things like the originality and the
7 genesis of those commands, where they came from, whether or
8 not they're original with the author, and that sort of
9 thing.

10 I have been assuming that as this case went along,
11 through some process or another they would narrow that down
12 so we actually have something we could try in a couple of
13 weeks, but it hasn't happened. And we know darn well that
14 there are some of the words in these commands that everybody
15 in the industry is using because they come from some
16 industry standard.

17 We know there are other words that everyone's been
18 using, including lots of folks that started before Cisco
19 did, people at Stanford and people developing Unix and other
20 systems.

21 So unless we do that in some fashion, we're going to
22 have a totally mixed-up trial. We're going to have a really
23 mixed-up trial, in my mind.

24 For example -- give you the example of Oracle. We
25 spent a couple of months working on the fair use jury

1 instruction until we got it into the shape that Judge Alsup
2 felt it should be with -- we had multiple hearings. I'm not
3 proposing that.

4 But we had multiple versions of it, and because clearly
5 that was going to be the focal point for the jury's work.
6 And by the time the trial started Judge Alsup had in mind,
7 and we all did -- we had a set that was final and that we
8 were going to work with, no matter what. Whatever
9 objections had been made were resolved. And the jury got a
10 very clear roadmap to what their job was.

11 And that's the same sort of thing that we're asking for
12 here. And in this case, it's required by the Ninth Circuit
13 in Apple/Microsoft and Harper House. And we have a number
14 of other cases we'll cite when we file, if your Honor gives
15 us leave to do that.

16 And they all make clear that it's a judicial task and
17 needs to be done before the trial, especially in a case
18 where there's this much material that they're wanting to
19 pursue, these 500 individual commands. They can be grouped,
20 but there's still 500 of them at the end of the day.

21 THE COURT: Okay. Thank you.

22 Ms. Sullivan, let me hear from you.

23 MS. SULLIVAN: Thank you, your Honor. You're
24 right that Judge Alsup gave the bum's rush to this idea and
25 you should too.

1 What Mr. Van Nest, my friend, is proposing is something
2 that has actually never happened in the Ninth Circuit and
3 certainly is not required by the Ninth Circuit, and that is
4 this mini trial before the trial.

5 And let me just start with how my friend has mis-cited
6 to you the Apple versus Microsoft precedent as well as the
7 Harper House precedent.

8 Apple versus Microsoft arose on a series of summary
9 judgment and summary adjudication motions. It's perhaps the
10 most extended summary judgment proceeding ever in this
11 circuit. Between them, Judge Schwarzer and Judge Walker
12 issued six different opinions. But the way that came about,
13 your Honor, was through summary judgment and through summary
14 adjudication motions by Apple.

15 And Arista is free here, complying with the Court's
16 schedule, to file whatever summary judgment or partial
17 summary judgment or summary adjudication motions it wishes
18 on the issues of copyrightability and on the issues of
19 protectability, on the issue of whether as a matter of law,
20 based on the expert evidence so far, certain elements are
21 unprotectable.

22 That's what was done in Apple versus Microsoft through
23 the summary judgment procedure, not through some separate
24 mini trial. It just didn't happen there and it shouldn't
25 happen here.

1 They're free on June 30th, if they wish, to try to
2 narrow Cisco's case through a proper summary judgment motion
3 that puts before this Court whatever evidentiary support is
4 needed to make their assertion that as a matter of law
5 anything that we have said is copyrightable is not
6 copyrightable or as a matter of law anything that we say is
7 protectable is not protectable for purposes of the
8 filtration analysis.

9 The second place that my friend misstates what the
10 Ninth Circuit has required is the reference to Harper House.

11 Harper House went up on jury instructions. It was an
12 instructional error appeal. And ironically it was Judge
13 Rymer's instructions that get reversed in Harper House. And
14 then of course Judge Rymer, when she's on the Circuit,
15 writes Apple versus Microsoft, setting forth the definitive
16 law of filtration.

17 So one can say that Judge Rymer certainly internalized
18 the message of Harper House.

19 THE COURT: Yes.

20 MS. SULLIVAN: But where Judge Rymer was reversed
21 was on jury instructions, as failing to adequately
22 distinguish for the jury what elements were protectable from
23 what elements were unprotectable.

24 THE COURT: And so there's no dispute that before
25 the case goes to the jury, the instructions will have to

1 advise the jury what is protectable and what is not.

2 MS. SULLIVAN: Absolutely correct, your Honor.

3 THE COURT: All right. And so just jumping ahead
4 a little bit, because I do have to consider the practicality
5 of making all of this happen and being ready on that trial
6 date, do you propose that this is accomplished at the end of
7 the presentation of the evidence, that the jury is literally
8 sent home while we develop this and I make my rulings?

9 MS. SULLIVAN: Well, your Honor, I think there are
10 really three points at which we can address these issues.

11 THE COURT: Okay.

12 MS. SULLIVAN: One is the summary judgment motions
13 that will come before you through the ordinary course
14 starting on June 30th.

15 THE COURT: Yes.

16 MS. SULLIVAN: Okay. And summary judgment or
17 partial summary judgment or summary adjudication is an
18 appropriate vehicle for Arista to try to argue protectable
19 elements versus unprotectable elements along the lines that
20 Mr. Van Nest suggests.

21 THE COURT: But at a high level of undisputed
22 facts and there is a factual element here. So that's a
23 limitation --

24 MS. SULLIVAN: Yes, your Honor.

25 THE COURT: -- on the effectiveness.

1 MS. SULLIVAN: Correct, your Honor.

2 But then the second place is in our preliminary
3 submission of jury instructions, which will take place
4 according to your Honor's standing order on October 21st.
5 So the parties can debate how the jury should be instructed
6 on protectability in submitting the jury instructions to the
7 Court.

8 And then, yes, at the close of evidence, when your
9 Honor is deciding what to do about the jury instructions
10 when you finally deliver them, you will have had the benefit
11 of hearing the evidence in the case, which will inform the
12 discussion of protectability.

13 Remember what Judge Alsup said in rejecting the
14 proposal of the same procedure in Oracle versus Google.
15 Judge Alsup said that the Court is convinced that the best
16 way to proceed is to rule on the copyrightable issues at the
17 end of the copyright portion of the trial. Neither side has
18 any right to an advanced determination of these issues
19 before trial. And it is sufficient that the jury will be
20 properly instructed before commencing deliberations.

21 Your Honor, if I could just suggest, there's a fourth
22 place.

23 THE COURT: Okay.

24 MS. SULLIVAN: The 50(a) motions at trial at the
25 close of plaintiff's case or at the close of evidence are

1 also an opportunity for protectability to be raised.

2 What I would say, your Honor, is yes, the Ninth Circuit
3 has made protectability an issue for the Court. But where
4 the Court usually makes legal decisions is, A, in summary
5 judgment; B, in jury instructions; C, in 50(a)'s; and D, in
6 50(b)'s. So you'll have ample opportunity to make --

7 THE COURT: Yeah.

8 MS. SULLIVAN: -- any legal determination here
9 without coming up with this new jerry-rigged mini trial idea
10 that's never been blessed by the Ninth Circuit.

11 And just to be clear, Apple versus Microsoft did not
12 require a pretrial determination.

13 THE COURT: Yeah.

14 MS. SULLIVAN: Apple versus Microsoft simply
15 reviewed summary judgment that was decided in the lower
16 courts according to the ordinary motion practice of summary
17 judgment. There was no mini trial in Apple versus
18 Microsoft.

19 And, again, Harper House was just on instruction.

20 So your Honor, if I could just make one last point. I
21 think that -- I'd like to make sure that the Court is clear
22 that this is not a case in which Cisco is asserting
23 copyright protection for 500 individual CLI commands.

24 To the contrary, the copyrighted work that we're
25 asserting was copyrighted is our operating system, our

1 source code, our user interface, our commands, our modes,
2 our hierarchies, our manuals, our help screens, and the
3 combination of those things.

4 And your Honor is exactly right, that filtration can
5 never be reductio ad absurdum where you say: Well, there's
6 one note, Bb, that is in the common domain. Therefore,
7 since that's unprotectable, the whole song is unprotectable.

8 Same thing with a word like "show" in a command line.
9 So filtration should never be an exercise in which you
10 disaggregate something down to such granular parts that you
11 forget what copyrighted work is before you.

12 So, with respect, I don't think we should get into the
13 merits of protectability here. All we'd really like you to
14 do is deny this request for a highly unusual and
15 unprecedented mini trial procedure, which as your Honor
16 correctly observes, has the real potential to escalate into
17 an evidentiary contest that in some sense usurps and
18 displaces the very role of the jury in this case, guided by
19 the Court's instructions.

20 The places that we should have this out is in summary
21 judgment, jury instructions and the 50(a)'s and 50(b)'s.

22 THE COURT: All right.

23 MR. VAN NEST: May I respond very briefly, your
24 Honor?

25 THE COURT: Yes, please.

1 MR. VAN NEST: This is a proposed train wreck.
2 And the reason I say that is none of the stuff that counsel
3 recited like source code is there any claim of conflict,
4 right? This is all about the CLI.

5 And the reason I say it's a train wreck is that, like
6 many plaintiffs, they would like to roll as far into the
7 trial as possible and invite some kind of a hearing at the
8 end of the evidence where the jury's waiting for jury
9 instructions, which is just not practical.

10 In Apple, the summary judgment happened because Apple
11 stipulated to summary judgment after Judge Walker made all
12 the determinations of fact.

13 THE COURT: Sure.

14 MR. VAN NEST: And you know darn well when she
15 stands here and says it's all about summary judgment, their
16 first point is going to be: You can't resolve this on
17 summary judgment, your Honor, because there's questions of
18 fact.

19 And I'm here to say I don't want you to be
20 disappointed, because there are and may be fact
21 determinations you have to make outside of the framework of
22 summary judgment in order to get this case ready for trial.

23 So I'm not promising. If I thought we could resolve it
24 on summary judgment, I'd be asking for more pages for my
25 summary judgment motion.

1 THE COURT: Yeah, yeah.

2 MR. VAN NEST: But I'm trying to be honest with
3 your Honor, I don't think it's practical. And unless
4 they're waiving their objection to this, which they're
5 surely not, their first point is going to be it's a question
6 of fact and you can't resolve it on summary judgment. And
7 I'm saying, hey, I don't care what procedure we use, and I'm
8 not advocating that we must have an evidentiary hearing.

9 I'm saying give me some pages to put this before your
10 Honor. You can always then say, "You know, I don't think
11 it's necessary" or "I'm not required to do it" or "I don't
12 think it will advance the trial agenda."

13 I'm not asking to change the schedule. I'm doing this,
14 suggesting it be in parallel with summary judgment. If you
15 look at it and say "It's too complicated, Counsel, to do
16 this, I'd rather do it during the trial," okay, we'll have
17 our objection but --

18 THE COURT: I appreciate that.

19 So, Ms. Sullivan, I have not really had the opportunity
20 to understand the full scope of the copyright part of this
21 case. I just issued the claims construction. That's a
22 little part of this case.

23 MR. VAN NEST: Thank you.

24 THE COURT: You're welcome. It had to get out.

25 So if I agree with you that I don't need to order this

1 briefing schedule that Mr. Van Nest suggests, I do want to
2 be sure that I am able to understand the issue and deal with
3 the evidence and render a decision in an orderly way while
4 we have a jury waiting.

5 So that always concerns me. We are literally against
6 the clock on this jury trial so this jury can go home for
7 Christmas, although if they have to come back in January,
8 they do.

9 So this gets to be a very practical concern of mine.

10 MS. SULLIVAN: Yes, your Honor.

11 THE COURT: And I agree with Mr. Van Nest. This
12 actually doesn't sound like a summary judgment issue, that
13 he's not likely to be successful if I have dueling experts,
14 which I'm likely to have. And the summary judgment standard
15 doesn't bend.

16 So then I move into a -- there will be factual
17 determinations that I will have to make, which I'm more than
18 glad to do. It's what we do all the time. And if it --
19 what you're suggesting is these factual determinations would
20 simply be the predicate to a jury instruction as opposed to
21 a reasoned order, which of course you don't get in a trial.
22 We know that doesn't happen.

23 So I'm just concerned about -- I will need to make
24 factual determinations in order to apply the law on what is
25 protectable and what is copyrightable in order to write a

1 jury instruction and, more importantly probably, a verdict
2 form that the jury can actually determine.

3 So I just want to be sure that even if I deny what Mr.
4 Van Nest is suggesting, that we have a process in place that
5 gives you the fair opportunity to present these issues to me
6 for determination.

7 MS. SULLIVAN: Well, yes, your Honor. And we
8 think that the ordinary course should be summary judgment.

9 And with respect, I do think if there were actually an
10 undisputed fact giving rise to an inference of
11 unprotectability, then the case would be narrowed on summary
12 judgment. We don't think that will arise.

13 THE COURT: Sure.

14 MS. SULLIVAN: But it's the proper place. It's
15 where Apple versus Microsoft -- that's where the rubber hit
16 the road in Apple versus Microsoft was summary judgment.

17 Second, your Honor, we'll put a great deal of work into
18 our proposed jury instructions and our proposed verdict form
19 in order to make protectability issues as clear as possible
20 for you to explain to the jury. And that will be pretrial.
21 So it won't be some train wreck that arises when the jury is
22 sitting idly by.

23 THE COURT: Yeah, yeah.

24 MS. SULLIVAN: So we'll put that work in in
25 advance. But there's literally nothing in any Ninth Circuit

1 precedent that suggests that the filtration analysis or the
2 analytic dissection of the elements of similarity that takes
3 place under the extrinsic first prong of the Ninth Circuit's
4 test -- there's nothing that suggests that that should be
5 done as a matter of law through some extraordinary pretrial
6 procedure.

7 That's simply --

8 THE COURT: Well, I don't think it's done as a
9 matter of law, do you? I think there are factual --

10 MS. SULLIVAN: Mixed question.

11 THE COURT: It's a mixed question.

12 MS. SULLIVAN: Correct, your Honor.

13 THE COURT: But it's a mixed question that comes
14 to me.

15 MS. SULLIVAN: That's right, your Honor.

16 THE COURT: Yeah, yeah. And that's fine. And
17 that's -- well --

18 MR. VAN NEST: Your Honor, if we're going to do
19 this, why not start early? I mean this is the thing that so
20 often trials get off the rails, in my experience, because we
21 don't start early enough. If your Honor would entertain the
22 briefs, you don't have to decide anything on August 4th if
23 you think that we can wait or we can push it off.

24 But if we wait until October 19th --

25 THE COURT: Yeah.

1 MR. VAN NEST: -- with the context of jury
2 instruction, we're going to be in this mess at the pretrial
3 conference where we should be talking about the fine-tuning
4 of how this trial's going to happen, not the broad scope of
5 what's the jury actually going to do.

6 And all I'm asking is that we have a chance to brief it
7 in some fashion. And I'm not promising summary judgment,
8 because again --

9 THE COURT: No.

10 MR. VAN NEST: -- she's conceded that it isn't
11 summary judgment.

12 MS. SULLIVAN: I didn't.

13 THE COURT: You know what, frankly I appreciate
14 that you wouldn't waste everyone's time on summary judgment
15 when you know it's not proper. I appreciate that.

16 You know, I am going to want this briefing. Your
17 motions in limine are not really the proper place for this.
18 They're short. They're not intended to be summary judgment
19 issues.

20 This is separate. I do need briefing on this issue. I
21 do want to see the contours of the factual issues here so
22 that I can understand it. And I don't want to get that a
23 week before trial, because I think it's more than I can
24 absorb.

25 So I do want the briefing. But I guess the one bit of

1 clarity I can bring to you now is I'm not going to allow a
2 hearing on this on August 4th, and I'm not going to make a
3 determination in advance of trial as you suggested in the
4 statement.

5 But that being said, Mr. Van Nest, what you're
6 suggesting now, that I ask you to brief this issue and
7 develop this issue for me so that I'm fully ready to deal
8 with it at the right time, is very attractive to me. And I
9 don't know that there's any opposition to that.

10 I'm not even suggesting that you provide to me the
11 expert reports. I am really -- but maybe that is even
12 appropriate. In a certain sense, I'm putting it on the
13 shelf until I'm ready to deal with it, but I'm not presented
14 with it with the deluge of pretrial submissions.

15 I don't think it's enough just as a jury instruction
16 because there's so much that is in advance to developing the
17 jury instruction.

18 So do you object to some procedure there?

19 MS. SULLIVAN: Well, your Honor, it depends on
20 what the procedure is.

21 THE COURT: Yes, it does.

22 MS. SULLIVAN: We want to assist the Court,
23 obviously. We want to assist the Court with this very
24 important issue under Ninth Circuit law, and we think that
25 the proper place to start is to see how the summary judgment

1 motions arise. And I did not concede that summary judgment
2 is not appropriate.

3 To the contrary, I argued to you that Apple versus
4 Microsoft arose from summary judgment motions.

5 THE COURT: Yeah.

6 MS. SULLIVAN: And if Arista wants to move for
7 summary judgment on issues of protectability, they should so
8 move.

9 I think it's premature to try to assist the Court with
10 this determination now in the abstract based on only the
11 expert reports. I think what Judge Alsup said in
12 Google/Oracle -- Oracle/Google was that "After the judge and
13 jury hear the evidence" -- I'm reading now from the prior
14 order. This is docket 584 in Oracle/Google.

15 THE COURT: Yeah.

16 MS. SULLIVAN: "After the judge and jury hear the
17 evidence, the judge will then give proper law instructions
18 and will rule on questions the Court of Appeals has
19 designated as solely for the judge. These issues are best
20 left until after the judge has heard the evidence at trial."

21 And, your Honor, with respect to issues like those Mr.
22 Van Nest refers to, like where did the commands come from,
23 who authored them, that will depend on fact witness
24 testimony at trial.

25 So with respect, we're not sure how we can brief these

1 things in a useful way in the abstract over the summer.

2 If the Court would like a protectability brief in
3 addition to other pretrial materials, might I suggest a
4 possible alternative of asking for protectability briefs,
5 just simple straightforward briefs at the same time as we
6 submit our pretrial materials, but as a separate matter so
7 we can frame the issue for you then.

8 I'm just fearful that this is piling on to an already
9 very crowded summer schedule where we're still completing
10 damages discovery and damages expert reports.

11 THE COURT: I understand.

12 MR. VAN NEST: She's fearful.

13 MS. SULLIVAN: Excuse me, Mr. Van Nest.

14 And where we have summary judgment motions to attend to
15 and where we have a number of things to get ready for for
16 pretrial, that to superimpose this extra briefing at this
17 point is premature.

18 So if your Honor would like a protectability briefing,
19 could we respectfully suggest that it be submitted closer to
20 the time of trial?

21 THE COURT: Well, to me, it's -- we're already
22 pretty close to trial. I appreciate that there's a lot
23 going on in this case. But when I look at my trial schedule
24 leading up to it, I have to see where I actually have the
25 time as well. So that's of concern to me.

1 And there's one of me, and although I haven't counted
2 the number of lawyers, I've signed all of those pro hac vice
3 forms and there must be 50 of you. So I'm sure that there
4 could be 51 if needed, and that wouldn't be a hardship.

5 MR. VAN NEST: I wish that were true, your Honor.

6 THE COURT: Ultimately I'll need a protectability
7 brief, but just a brief on the law is not -- I mean I'll
8 welcome it but I don't think that's really the issue.

9 The issue is really going to be for me to understand
10 better what Cisco is presenting as protectable and to define
11 that for me, because I don't know that the complaint is
12 really the best place for me to understand that. That's
13 more what you would do in a trial brief close to trial.

14 I have to have a good handle on what that is. I have
15 to be able to visualize it, understand it and then to take
16 that description and look at the law on protectability,
17 because I don't know whether I'm looking at the minutiae of
18 command lines or if I'm looking at this bigger structure of
19 the operating system or something in between. That's what I
20 really need to understand, and I don't have that yet.

21 So, no, I don't think you need to brief it as you're
22 briefing your summary judgment. That's coming right up.
23 But -- or at least not in June. But to wait until your
24 briefing is done gets you to middle of July. And, yes, I
25 think I would like to see -- I think the issue needs to be

1 teed up for me in the very earliest parts of the fall, not
2 for decision but for me to understand it and then for me to
3 be able to manage the trial in a way that gives us
4 sufficient time for me to develop the final jury instruction
5 and the orders that will be necessary in order to get there.

6 MR. VAN NEST: Your Honor, we --

7 THE COURT: So, yes, I would like that.

8 MR. VAN NEST: We were willing to file June 3rd --

9 THE COURT: Yes.

10 MR. VAN NEST: -- so if your Honor had us file in
11 the middle of July, that's fine.

12 THE COURT: All right.

13 MR. VAN NEST: And they can take what time they
14 need to respond. But I do think -- we'll be ready soon.

15 THE COURT: Yeah.

16 MR. VAN NEST: So you don't need to wait on our
17 account.

18 THE COURT: Okay. But to Ms. Sullivan's point,
19 not for decision pretrial.

20 MS. SULLIVAN: Correct, your Honor.

21 THE COURT: So that I do agree with you on.

22 MS. SULLIVAN: Good. Thank you, your Honor.

23 If I could just respectfully suggest that we get
24 through summary judgment, you have the hearing on August
25 4th --

1 THE COURT: Yes.

2 MS. SULLIVAN: -- and you set the date for the
3 protectability brief thereafter at that time, because it may
4 be the protectability issues have been explicated to you
5 through the summary judgment process.

6 THE COURT: Sure.

7 MS. SULLIVAN: And that may affect what it is you
8 want from us in further briefing.

9 THE COURT: I think that makes sense. Just to
10 give you a broad sense, if our hearing is on August 4th and
11 I would want briefing completed on the protectability issue
12 by Labor Day, and that should be ample time to have that
13 month and especially knowing three months in advance that
14 that's what I'd be looking for.

15 MR. VAN NEST: So --

16 THE COURT: Yeah.

17 MR. VAN NEST: -- you want all the briefs in by
18 Labor Day?

19 THE COURT: That's right. That's what I'm
20 thinking.

21 MR. VAN NEST: Okay. So we can work the schedule
22 out basically.

23 THE COURT: You can, but then you won't be
24 briefing it now. I mean I certainly welcome appropriate
25 summary judgment motion that includes some of these issues.

1 But I have to leave that in your hands, Mr. Van Nest,
2 if it's worth your effort at this point to devote some of
3 your summary judgment pages to this issue. And I appreciate
4 that you may choose not to.

5 MR. VAN NEST: I think with only 25 pages --

6 THE COURT: Yeah.

7 MR. VAN NEST: -- and right now kind of a
8 sprawling mess of a case with the patent and the copyrights
9 and 500 of them and issues with protectability and so on and
10 so forth, I think it would be difficult in our 25-page limit
11 to do that.

12 THE COURT: I understand. I understand.

13 MR. VAN NEST: If we think there's something we
14 can do, we will of course. But I think that given the
15 constraints of your Honor's schedule and page limits and so
16 on, I don't think that will be practical.

17 Right now we're dealing with a number of issues where
18 we think we have clean summary judgment shots that will
19 reduce the case, may eliminate it if your Honor were to find
20 that the CLI were not copyrightable, as we think you should.
21 But apart from that, we will be attacking the rest of the
22 case on summary judgment.

23 But, again, I don't think this thing we're talking
24 about today -- at least as I envision it, I don't think that
25 all of it is amenable to summary judgment. Maybe some of

1 it. And so I'll talk to the team about that.

2 THE COURT: Okay.

3 MR. VAN NEST: And I understand your Honor doesn't
4 want to lift the page limits on summary judgment. So I'll
5 live with what I have.

6 THE COURT: You know, I rarely find it is helpful.
7 I don't -- I guess on this issue I just think that I'm going
8 to have to make factual determinations based on what you're
9 describing as your reasoning for some of these -- for the
10 filtering that you're suggesting, it's going to be a mixed
11 question of law and fact.

12 And if Cisco didn't contest the facts, then you don't
13 actually have to file a motion, because they would agree to
14 narrow the scope of their case.

15 MR. VAN NEST: That's right. And, your Honor, I
16 hope -- I understand what you're saying about not pretrial,
17 but I hope when you see our brief and the briefing is all
18 in, you'll realize that there are issues that can and should
19 be dealt with pretrial.

20 They continue to cite to Judge Alsup's order. He
21 bought himself two trials. I mean the whole point of that
22 was --

23 MS. SULLIVAN: Well --

24 THE COURT: Well, my -- but I don't think the
25 federal circuit reversed him because he waited until jury

1 instructions --

2 MS. SULLIVAN: That's correct, your Honor.

3 MR. VAN NEST: They did. The determination that
4 he made on copyrightability is what was reversed.

5 THE COURT: I understand, but do you actually
6 think he would have made a different decision if he had made
7 it earlier?

8 MR. VAN NEST: No, no. I think he would have made
9 the same decision, but we wouldn't have had the first trial.
10 That's my point.

11 THE COURT: Okay.

12 MR. VAN NEST: In other words, if it --

13 THE COURT: So it was a train wreck for you --

14 MR. VAN NEST: Huh?

15 THE COURT: -- but not for the judge.

16 I'm only worried about my own train wrecks.

17 MR. VAN NEST: That's right. But, no, he went
18 through it twice too. I mean from Judge Alsup's
19 standpoint --

20 THE COURT: No, I understand.

21 MR. VAN NEST: -- the fact that he did it that way
22 caused him to have two trials.

23 THE COURT: But the point that I'm making is that
24 he wasn't criticized by the federal circuit for making the
25 determination on protectability and copyrightability after

1 the close of the evidence.

2 The federal circuit ruled that he was incorrect on the
3 determination he made.

4 MR. VAN NEST: That's true.

5 THE COURT: But he would have been incorrect if he
6 had made it earlier as well.

7 MR. VAN NEST: That's true, that's true.

8 THE COURT: Okay. So that's really the issue.

9 So I am going to -- when I get that briefing -- and I
10 welcome you discussing and describing the scope of the issue
11 and to make it factually based for me so that I understand
12 it. And I don't mean submitting all of your evidence, but I
13 do need you to describe what the evidence will look like.

14 I really want it more like an opening statement. I
15 don't want all the evidence submitted with this briefing. I
16 want to be clear on that. But you know the contours of your
17 evidence. You will certainly by then.

18 I just -- but really, I'm not looking for a mountain of
19 paper.

20 MR. VAN NEST: You'll get a summary. You want a
21 summary.

22 THE COURT: I need a summary, yes.

23 MR. VAN NEST: That's right. And we'll do that.
24 And we can do that in a precise fashion.

25 THE COURT: Because then I can decide to have

1 further case management where we can discuss whether in fact
2 something has to be done pretrial.

3 So this is -- it's really an early trial brief is what
4 I see it as.

5 MS. SULLIVAN: That's right, your Honor.

6 Could I just respectfully suggest from Cisco's
7 perspective a few limitations on this supplemental briefing
8 along the lines your Honor discusses.

9 THE COURT: Yes.

10 MS. SULLIVAN: That it should be brief only, no
11 declarations --

12 THE COURT: Yes.

13 MS. SULLIVAN: -- no submission of evidence, point
14 one.

15 Point two, that it should be simultaneous briefs of
16 similar length, if your Honor thinks 15 pages is suitable.

17 THE COURT: Well, Mr. Van Nest has suggested 15
18 pages and I think that's probably suitable. I agree. I
19 don't actually want evidence. You can tell me that your
20 expert will testify. That's fine. You can lay that out,
21 but you don't have to establish it. And these briefs aren't
22 going to be used against the other side if you fail to prove
23 something in it.

24 This is a bench brief for me. This is to help me. So
25 I want to make that clear. But, yes, I agree. 15 pages.

1 MS. SULLIVAN: Simultaneous.

2 THE COURT: I think simultaneous is fine. I'd
3 even give each of you the chance to do a five-page response
4 to the other if you'd like.

5 MR. VAN NEST: That's fine. We'd like that, your
6 Honor.

7 THE COURT: Yeah. I think that's helpful.

8 MS. SULLIVAN: Simultaneous in both instances.

9 THE COURT: Exactly, exactly.

10 MS. SULLIVAN: So nobody gets the last word.

11 THE COURT: That's right, that's right.

12 MS. SULLIVAN: Okay. All right, your Honor. Of
13 course we're very happy to assist the Court, and the bench
14 brief after the Court has had the opportunity to decide the
15 summary judgment issues --

16 THE COURT: Yes. And we'll know the scope of
17 those, which we don't today.

18 MS. SULLIVAN: -- is appropriate.

19 And if I could just specify a third thing about this
20 brief.

21 THE COURT: Sure.

22 MS. SULLIVAN: This briefing will not result in
23 any decision by the Court.

24 THE COURT: And there would be no decision by the
25 Court.

1 MS. SULLIVAN: This is simply to aid the Court.

2 THE COURT: The biggest decision would be to have
3 further case management, no substantive decision.

4 MS. SULLIVAN: Okay.

5 THE COURT: All right.

6 MS. SULLIVAN: May I confer for just one moment?

7 THE COURT: Yes, please.

8 (Pause.)

9 MS. SULLIVAN: Your Honor, Cisco is agreeable to
10 that. Thank you.

11 THE COURT: Thank you very much.

12 Is that acceptable?

13 MR. VAN NEST: I'm sorry, I was conferring. I
14 didn't hear what Ms. Sullivan said.

15 MS. SULLIVAN: I said we were glad that you
16 conceded the case.

17 Mr. Van Nest, we simply said that 15 pages,
18 simultaneous briefs, plus five pages simultaneous reply
19 briefs, and it will not result in any decision by the Court.

20 MR. VAN NEST: The only thing I would state, your
21 Honor, is why decide today what you're going to decide in
22 the future. In other words, you don't have to commit to
23 anything but --

24 THE COURT: Because of the way I've structured
25 this briefing, I'd be unable to decide because there will be

1 no evidence submitted. This is just an early trial brief on
2 one issue. I want to make that clear.

3 And then I will understand the scope of the issue
4 better.

5 All right. I think I've covered all of the issues in
6 your --

7 MR. VAN NEST: I think you have, your Honor.

8 THE COURT: Well, I greatly appreciate this. And
9 this case needs this kind of care, and I want to make sure
10 that I have the opportunity to be fully informed of these
11 issues so I can make good rulings for you. We all end up
12 with trial do-overs, and we hope that it's not based on
13 something that we could have avoided.

14 Just being wrong is just the way it goes for judges, so
15 that's not the issue. But not being prepared is something
16 we can avoid.

17 All right. Thank you all.

18 MR. VAN NEST: Thank you, your Honor.

19 MS. SULLIVAN: Thank you, your Honor.

20 (Proceedings adjourned at 12:15 p.m.)
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25

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



Echo Reporting, Inc., Transcriber

Wednesday, June 22, 2016